

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WARD,

Defendant-Appellant.

UNPUBLISHED

August 31, 2004

No. 248605

Wayne Circuit Court

LC No. 03-000220-01

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of fourth-degree criminal sexual conduct, MCL 750.520(e)(1)(b) (force) for which the trial court sentenced him to one year of probation. We affirm.

I. Basic Facts

The victim testified that one night while she and her friend were at a bar, defendant approached her two times. The first time, defendant reached under the victim's skirt, touched her thigh, and asked, "How are you doing?" She gave him a "dirty look" and walked to the other side of the bar. The second time, just before the bar closed, defendant again put his hand under the victim's skirt, grabbed her genital area, and told her he would see her later. The victim slapped defendant's arm and exclaimed, "What the hell are you doing?" Defendant immediately exited the bar. The victim's friend testified that she saw defendant reach for the victim, but did not actually see the contact. She saw the victim "swing at [defendant], and [the victim] just turned around and said . . . what an a-----. He just grabbed my crotch."

II. Analysis

A. Effective Assistance of Counsel

Defendant first argues that he was denied the effective assistance of counsel because defense counsel waived two police witnesses, failed to call several witnesses for the defense, and failed to call defendant to the stand. We disagree.

To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so

prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because a *Ginther*¹ hearing was not held in the trial court, our review is limited to errors apparent on the record. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002). “In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel’s failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding.” *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

With regard to the witnesses defendant argues may have impeached the victim’s testimony, the record indicates that other people at the bar would likely not have seen defendant’s surreptitious grab of the victim’s genital area. The victim’s friend, who was standing near the victim, did not even see defendant touch the victim; rather, she saw and heard the victim’s reaction. Therefore, there is no indication in the record that these witnesses would have provided defendant with a substantial defense.

With regard to the police officers, defendant argues that if they had been called as witnesses, defense counsel could have brought about discrepancies in the victim’s description of the event. But again, there is no indication in the record that there were any major discrepancies in the victim’s description of the event. Thus, we cannot conclude that these witnesses would have provided defendant with a substantial defense.

Defendant also argues that defense counsel should have called to other witnesses who would have testified that Joe Emery, a friend of the victim and defendant’s supervisor, had “manufactured and engineered the charges against [defendant] in the instant case.” But the record contains no indication that such testimony would have been provided.

Nor has defendant shown that defense counsel was ineffective for not calling defendant to testify on his own behalf. Defense counsel argued that the prosecution failed to present sufficient evidence to convict defendant beyond a reasonable doubt. During trial, defense counsel vigorously cross-examined the two prosecution witnesses. Defense counsel explored the amount of alcohol consumed by the witnesses, the victim’s relationship with Emery, the lack of corroborating eyewitnesses, and the victim’s delay in reporting the incident. The record indicates that the decision to not call defendant to the stand was part of defense counsel’s strategy. Defense counsel stated in closing argument:

And Mr. Ward has decided not to testify.

You pledged to understand that in this country, everyone has an absolute right to silence, and that’s not something that you can conjecture about.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)

It's difficult to testify.

There can be many reasons he chooses not to.

We don't believe that the prosecution has made its case beyond a reasonable doubt, so it was our decision that Mr. Ward not testify.

Therefore, on this record, we find that defendant has failed to demonstrate that counsel's decision not to call several witnesses and defendant to the stand was objectively unreasonable and so prejudicial as to deprive defendant of a fair trial. Counsel is not ineffective merely because the chosen trial strategy is unsuccessful. *People v Kervorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

B. Defendant's Waiver of the Right to Testify

Defendant also argues that he is entitled to a new trial because the trial court failed to "ascertain on the record whether defendant intelligently and knowingly waived his right to testify[.]" But there is no requirement in Michigan that a defendant waive his right to testify on the record. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991). Nor does the trial court have a duty to determine on the record whether a defendant has made a knowing and intelligent waiver. *Id.* at 661-662.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly